No. 48947-3-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

TAZMINA VERJEE-VAN,

Appellant,

vs.

PIERCE COUNTY, a subdivision of the State of Washington; and PLANNING AND LAND SERVICES DEPARTMENT (PALS), a department of Pierce County;

Respondents.

APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY
Cause No. 14-2-09794-3

BRIEF OF APPELLANT

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I. INTRODUCTION

Developments along shorelines of state-wide significance require land owners to follow the Shoreline Management Act (SMA), the local Shoreline Master Program (SMP) and various RCWs, WACs and local codes before developing on their property. Pierce County, through the Pierce County Prosecutor's Office, is required to enforce the various statutes and codes so that uniform development occurs. Here, Pierce County has arbitrarily and capriciously allowed development along Lake Tapps' shoreline and has failed to uniformly apply these regulations so that development along the shoreline would be uniform.

Having no recourse but to enlist the trial court for assistance to direct the County to act, Tazmina Verjee-Van asked the court to direct the County, by way of a writ of mandamus, to apply these regulations to neighboring properties that impact her property. The court failed to do so. Respectfully, the trial court's rulings were in error, and Ms. Verjee-Van urges this Court to reverse the trial court's decision and direct that a writ be issued or, in the alternative, order that an evidentiary hearing be held so that the court can have an accurate factual basis before deciding whether a writ of mandamus should issue.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it held that appellant's petition for writ of mandamus constitutes a subsequent review of prior rulings.

2. The trial court erred when it held that appellant failed to exhaust all administrative remedies.

3. The trial court erred when it held that appellant did not timely exercise her right to appeal.

4. The trial court erred when it held that an appeal was appellant's exclusive remedy to the County's land use decisions.

5. The trial court erred when it held that the County issued a final decision related to the fence and to the pier construction.

6. The trial court erred when it held that the doctrine of finality applies to the County's decisions in this case.

7. The trial court erred when it held that the County is not required to apply shoreline regulations to shoreline construction.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred when it held that the petition for writ of mandamus constituted a subsequent review of a County decision when no final decision was ever made with respect to permits for the Borgert pier or Abercrombie fence? (Assignments of Error #1, 2)

2. Whether the trial court erred when it held that appellant failed to timely appeal issues surrounding the Borgert pier or Abercrombie fence when no final decision had been made by the County for either structure that would mandate an appeal be filed? (Assignments of Error #3, 4, 5)

3. Whether the trial court erred when it held that the County issued a final decision for the fence and for the pier when neither structure received appropriate permits in order for the structures to be lawfully constructed. (Assignment of Error #5)

4. Whether the trial court erred when it held the doctrine of finality precluded review when no final decision had been made for either the fence or pier as the permitting requirements for each structure were incomplete. (Assignment of Error #5, 6)

5. Whether the trial court erred when it held that the County is not required to follow shoreline regulations when the clear language of said regulations is mandatory and not permissive? (Assignment of Error #7)

IV. STATEMENT OF THE CASE

A. Procedural History

On June 23, 2014, appellant filed a petition for writ of mandamus requesting that the Court order Pierce County to properly apply the permitting codes and statutes to appellant's neighboring property owners so that these neighboring property owners' structures would comply with the Shoreline Management Act and the Pierce County Codes. CP 1-11. After the County answered the writ, CP 12-15, the County filed a motion to dismiss the petition and attached various declarations in support. See CP 416-43, 4-64, 65-71, 72-74. In response, appellant filed her response and a declaration with additional documents in support. CP 75-87, 88-414. After the County filed its reply, CP 415-16, and an additional declaration, CP 417-27, the Court heard oral argument on March 18, 2016, RP 3-28. After taking the matter under advisement, the Court granted the County's motion and dismissed the petition for writ of mandamus. CP 430-34. Appellant timely filed her notice of appeal. CP 435-44.

Respectfully, appellant urges this Court to reverse the trial court's decision, remand the matter to the trial court with directions that the Court issue the writ directing the County to apply the Shoreline Management Act and the Pierce County Code requirements to appellant's neighboring property owners' structures so that said structures comply with said statutory provisions. Alternatively, appellant urges that this Court reverse the court order and direct that an evidentiary hearing be held.

B. Facts

In 1999, Ms. Verjee-Van purchased real property located at 4225 Lakeridge Drive East, Lake Tapps, Washington, Parcel No. 5065200040. During her term of ownership, she has been required to obtain, and has obtained, shoreline and building permits from Pierce County before

constructing various improvements on her property. All requirements demanded by Pierce County are set forth by the Pierce County Building and Shoreline Codes and the Shoreline Management Act as adopted by Pierce County, which is commonly referenced as the Shoreline Use Regulations, Title 20 of the Pierce County Code. CP 2, 13.

The property owned by Dan and Phyllis Abercrombie is situated adjacent to and northwest of the Verjee-Van property and is identified as Pierce County Real Property Tax Parcel No. 5065200030 ("Parcel No. 5065200030"). The Abercrombies erected both a six foot (6') and a four foot (4') fence situated on Parcel No. 5065200030, and on Parcel No. 520194000, which is owned by Cascade Water Alliance, which parcel contains a shoreline of state wide significance. Thee fences were erected without obtaining all permits required by the Pierce County Code. The fences also encroach upon Ms. Verjee-Van's permitted access to Lake Tapps. Over the years the Verjee-Van property has been permitted by the requiring entities, in particular, the Department of Ecology and Pierce County whenever Ms. Verjee-Van has sought to improve her property. CP 3, 13.

The Abercrombie's fence, constructed in 2012, is situated within the 50' shoreline setback area. A review of PALS' Online Permits shows that the Abercrombies did not obtain any permits for Parcel No. 5065200030 for any shoreline development, which would include construction of the Abercrombie's fence. CP 6.

Although Ms. Verjee-Van brought the fence to Pierce County's attention, the County failed to act and refused to require the Abercrombies to adhere to Pierce County Code, the Shoreline Management Act, and Department of Ecology requirements or to remove their fence. This fence encroaches on Ms. Verjee-Van's permitted property. CP 3.

Conversely, when Ms. Verjee-Van applied to construct a 4' fence on the same parcel boundary line that would run from the rear of her house to the 545' elevation contour line of Lake Tapps, she received written notice that Pierce County required a Shoreline Variance before allowing the fence to be constructed within 50' of the Ordinary High Water Mark (OHWM). CP 7.

Ms. Verjee-Van's neighbor to the southeast, Neil Borgert, owns real property identified as Pierce County Real Property Tax Parcel Number 5065200060. Mr. Borgert maintains a pier that was constructed without the required permits or review as required by the Pierce County Code and the Shoreline Management Act. Although this pier was brought to the County's attention, the County refused to take any action to require that this structure comply with the Pierce County Code and the Shoreline Management Act. This pier also encroaches on Ms. Verjee-Van's permitted property. CP 3-4, 13.

Respectfully, Pierce County's application of the Pierce County Code and the Shoreline Management Act is arbitrary and capricious. Accordingly, this Court should reverse the trial court's decision and order that a writ of mandamus be entered requiring Pierce County to properly apply the Pierce County Code and Shoreline Management Act uniformly to all property owners, or, in the alternative, order the trial court hold an evidentiary hearing to accurately determine the facts in this case.

V. ARGUMENT

A. Standard of Review

The trial court treated the County's motion to dismiss as a motion for summary judgment. On an appeal from summary judgment, the Court of Appeals engages in the same inquiry as the superior court. Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 860, 93 P.3d 108 (2004).

The standard of review is de novo and summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). All facts and reasonable inferences from them are construed in favor of the non-moving party. Clover Park Sch. Dist. No. 4.00, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). All questions of law are reviewed de novo. Berger v. Sonneland, 144 Wn.2d 91, 103, 26 P.3d 257 (2001). Respectfully, at the outset, the trial court erred by not holding a trial because material facts are in conflict and summary judgment was not possible based upon the competing facts.

A court may issue a writ of mandamus, "to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station." RCW 7.16.160. "The writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It must be issued upon affidavit on the application of the party beneficially interested." RCW 7.16.170. If disputed material fact issues exist, the trial court has discretion to hold a trial before it determines the appropriateness of mandamus. RCW 7.16.210. Before a writ will issue: (1) the party subject to the writ must be under a clear duty to act, RCW 7.16.160; (2) the applicant has no "plain, speedy and adequate remedy in the ordinary course of law," RCW 7.16.170; and (3) the applicant is "beneficially interested." RCW 7.16.170. See Eugster v. City of Spokane, 118 Wn.App. 383, 402, 76 P.3d 741 (2003).

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B. Pierce County is Required to Follow the Shoreline Master Program for Development in Pierce County.

The Shoreline Master Program (SMP) for Pierce County, dated March 4, 1974, governs shoreline management within Pierce County. The SMP applies to Lake Tapps, which is a shoreline of state-wide significance. CP 402. Pursuant to § 25 of the SMP, the Pierce County Prosecutor is responsible for enforcement of the SMP and the Shoreline Management Act (SMA). CP 411. The Shoreline Management regulations are codified at Pierce County Code (PCC), Title 20.

Pierce County Code § 20.02.030 states as follows:

> Hereafter no construction or exterior alteration of structures, dredging, drilling, dumping, filling, removal of any sand, gravel or minerals, bulkheading, driving of piling, placing of obstructions, or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to the Shoreline Management Act of 1971 shall be undertaken except in compliance with the provisions of this Title and then only after securing all required permits.

Pierce County Code § 18.25.030 defines a "structure" as follows:

> "Structure" means anything that is constructed in or on the ground or over water, including any edifice, gas or liquid storage tank, and any piece of work artificially built up or composed of parts and joined together. For the purposes of this regulation, structure does not include paved areas, fill, or any vehicle.

Based on the foregoing definition, the Abercrombies' "fence" and the Borgert pier would reasonably be determined to be a "structure."

The following sections of Pierce County Code § 20.62.040 entitled "Environmental Regulations - Uses Permitted" apply to the Abercrombie fence and Borgert pier since the Verjee-Van property is situated in a Rural Residential zone classification:

> **20.62.040 Environment Regulations- Uses Permitted.**
> NOTE: The Pierce County Zoning Code and other County regulations also contain density, setback, and lot width requirements which are applicable in shoreline areas. These regulations must also be consulted, when appropriate, when developing on the

shoreline. In case of a discrepancy between the requirements of this Code and the Zoning Code, or other regulations, the most restrictive regulation shall prevail.

A. **Urban, Rural-Residential and Rural Environments**. The following specific regulations are applicable to the Urban, Rural-Residential and Rural Environments.

1. The following uses are permitted outright in the Urban, Rural Residential, and Rural Environments. The issuance of a building permit may be required:
   a. Construction, within the prescribed setback, bulk and height limitations of a single family residence by an owner, lessee or contract purchaser for his own or the use of his family.
   b. The construction of single family residences within a subdivision for the purpose of sale where the construction of said residences and the subdivision meet all applicable Master Program requirements.
   c. The following uses commonly accessory to single family residences constructed within the prescribed setback and height limitations:
      (1) Garages;
      (2) Sheds and storage facilities;
      (3) Bulkheads (see Chapter 20.28);
      (4) Piers, docks, buoys and floats (see Chapter 20.56).
   d. Residential subdivisions, determined not to be substantial developments.
2. The following uses are permitted upon the issuance of a Substantial Development Permit and building permit, if appropriate:
   a. The construction of single family residences for the purpose of sale which are not within a subdivision which has received prior approval of a Substantial Development Permit.
   b. Two family detached dwellings (duplexes).
   c. Residential subdivisions determined to be substantial developments.
   d. Structures commonly accessory to dwellings other than those listed in subsection A.1.c.

According to the foregoing, various permits are required in order to obtain approval before constructing the fence and the pier within the shoreline jurisdiction.

Pierce County Code § 20.62.050 entitled "Bulk Regulations" establishes "Special Setbacks for Shoreline Sites" as follows:

20.62.050 Bulk Regulations.

The following lot coverage, setback and height limitations shall be applicable to residential development in all shoreline environments. Exceptions may be made to the lot coverage and setback requirements if a project is developed pursuant to the Planned Development Ordinance.

A. Lot Coverage. Not more than 33-1/3 percent of the gross lot area shall be covered by impervious material including parking areas but excluding driveways.
B. Setbacks. All setbacks, with the exception of the setbacks from the ordinary high water line or lawfully established bulkhead, shall be as required by the Pierce County Zoning Code or other County regulations.
C. Special Setbacks for Shoreline Sites. The required setback for buildings and structures from any lot line or lines abutting the ordinary high water line or lawfully constructed bulkhead shall be 50 feet except that the special shoreline setback shall not apply to docks, floats. buoys, bulkheads, launching ramps, jetties and groins.

According to the foregoing, fences are required to be set fifty feet (50') back from the ordinary high water mark (OHWM), which is currently referenced as the 545 feet elevation contour line, as recorded on Plat of Lake Tapps Lakeridge under AFN 2064287 and Plat of Lake Tapps Lakeridge No. 2 under AFN 2107433.

The 545 contour line separates the upland owners' property from the Lake Tapps waterfront property, which is owned by Cascade Water Alliance. CP 13, see generally CP 313-380. Any shoreline development in this area must comply with the Pierce County Code and the Shoreline Management Act and any development must be appropriately permitted, at a minimum, through Pierce County and the Department of Ecology before any construction may begin.

C. The County Refuses To Apply The Pierce County Code To The Borgert Pier And Abercrombie Fence.

Neither the Borgert pier nor the Abercrombie fence were constructed after properly applying for a permit, and neither structure followed the submittal standards per State and County regulations. Conversely, whenever the Vans have sought to build any structure on their property, the County has required that the Vans apply for and obtain all necessary permits before construction of any structures.

1. *THE BORGERT PIER AND THE ABERCROMBIE FENCE WERE BUILT BEFORE ANY PERMITS WERE OBTAINED AND THE REQUIREMENTS FOR CONSTRUCTION HAVE NEVER BEEN SATISFIED.*

Title 18 of the Pierce County Code sets forth the general provisions for development within Pierce County. PCC 18.20.010. Pursuant to PCC 18.30.020, "[t]he property owner or authorized agent shall obtain applicable permits and approvals prior to commencing development." Pierce County Code 18.140.030 addresses permits, approvals, and uses. In part it states as follows:

> Pierce County regulations require acquisition of permits or approvals before certain activity may be performed. It shall be unlawful to conduct these regulated activities without first obtaining a written permit or approval.

PCC 18.140.030(A).

The Borgert pier, built by the former owner, Winnes, was constructed without a shoreline exemption letter from Pierce County. Significantly, the pier was constructed before submitting an appropriate application, without any required review, and without notice to adjacent property owners. Although the County suggests that the Winnes subsequently obtained a shoreline exemption and building permit for an "as built" pier, no Pierce County Code authorizes, much less recognizes, such a structure. Further, PCC 18D.20.020(C)(1)(a) states that the County cannot give authorization for any non-exempt action. Here, the County seeks to make something exempt in which it has no lawful authority to do so.

The County properly acknowledges that the Borgert pier, built by the former owner, Winnes, was constructed without first obtaining any permits from Pierce County or from any other entities with jurisdiction over the project. CP 17. What the County fails to acknowledge is that the pier was constructed before submitting any appropriate application, without any required review, and without notice to adjacent property owners.

Also under WAC 173-27-040 (1) (b) "To be authorized, all uses and developments must be consistent with the policies and provisions of the applicable master program and the SMA. A development or use that is listed as a conditional use pursuant to the local master program *or is an unlisted use*, (AS-Built Dock) must obtain a conditional use permit even though the development or use does not require a substantial development permit. When a development or use is proposed that *does not comply* with the bulk, dimensional and performance standards of the master program, such development or use can only be authorized by approval of a variance". No variance was either sought or obtained for the Borgert pier.

Had the Borgert pier been lawfully applied for and authorized, numerous documents would exist in the Pierce County file establishing that all shoreline standards had been complied with and that all state and federal jurisdictions (Ecology, DNR, Army Corps of Engineers, etc.) as well as all affected Indian tribes, had received notice of the application, environmental review, SEPA, any DNS, or any exemption. None of these documents exist in the Borgert pier file because the requirements were never met. No application was submitted pursuant to Pierce County Code 18.140.030 before the Borgert pier was constructed (1998) and no application was submitted before the Abercrombie fence was constructed (2012).

Even though the County is well aware of what is required when proposed construction is sought, the County routinely fails to require the Van's neighbors to follow the PCC requirements. Although the County asserts that the Borgert pier was authorized pursuant to an exemption, no code provision in the Pierce County Code authorizes the granting of a shoreline exemption without first following the permitting process, nor is such authority granted pursuant to the Shoreline Master Plan or the Shoreline Management Act. RCW 90.58.140.

In conjunction with the SMA, PCC 20.02.030 states "no construction . . . shall be undertaken except in compliance with the provisions of this Title and then only after securing all required permits." Even though this Code provision applies to the Borgert pier and the Abercrombie fence, the County, without lawful authority, ignored the regulation, and the County has consistently failed to enforce the laws it is required to enforce.

Unlike the process that the County allowed for the illegal Borgert pier and Abercrombie fence, the County is aware of what is required to be completed before such structures can be built. For example, in 2010, Pierce County sought permits to construct a storm drain on the Abercrombie property. See CP 90-176. As can be seen upon reviewing these documents, an application was submitted to the Pierce County Planning Department. The Planning Department accepted the proposal with all accompanying documents needed for all agencies. (JARPA, SEPA, etc.). The Planning Department subsequently sent notice to all required properties and adjacent property owners. Id.

In addition, a Request for Review and Response was mailed to all entities entitled to receive notification of the proposal. CP 173. In short, all necessary requirements to obtain a permit were followed.

In the County's storm drain application, a Determination of Nonsignificance (DNS) was issued, which required additional notice to various agencies and departments with the County, State and federal government. Importantly, Adonais Clark, the same person who issued the DNS for the Borgert pier, signed the DNS for the County's application. Unlike the Borgert pier DNS, the appropriate language is included regarding notice, comment period, and approval rights. Along with the DNS being issued, an environmental checklist (SEPA) was also sent to the

aforementioned County, State and federal entities. In short all of the Title 18 and Title 20 requirements were met. See CP 168-170.

After the comment period for the DNS expired, a hearing was set. Before the hearing was held a staff report was issued. See CP 177-274.

After the hearing was held, the hearing examiner issued his Report and Decision with findings and conclusions, which was sent to all of the entities listed. See CP 275. Importantly, although the application was started December 15, 2010, the final decision on the proposal did not occur until August 3, 2011. CP 301-310. Even though the County finalized the permit, no action could be taken until the Washington State Department of Ecology received the permit application and until after the applicable appeal period expired. CP 309. Not until the final appeal period expired was the permit final. CP 312.

The DNS requirements are set forth in WAC 197-11-340. CP 309-91. Unlike the storm drain permit the County applied for, the County simply did not require the Borgert pier to follow the code provision requirements that the County is required to enforce. Upon review of Exhibit "E" to Mike Erkkinen's declaration, CP 61, the following language is included:

> NOTE : Pursuant to RCW 43.21C.075 and Pierce County Environmental Regulations Chapter 18D.10.080 and Chapter 1.22 Pierce County Code, decisions of the Responsible Official may be appealed. Appeals are filed with appropriate fees at the Planning and Land Services Department, located at the Development Center in the Public Services Building. Appeals must be filed within 14 days of the date of publication of the Notice of Determination of Nonsignificance.
>
> NOTE : The issuance of this Determination of Nonsignificance does not constitute project approval . The applicant must comply with all other applicable requirements of Pierce County Departments and other agencies with jurisdiction prior to receiving construction permits.

The DNS related to the Borgert pier, by its own terms, sets forth certain requirements that must be satisfied before any proactive action can be taken. Further, the "note" states that

issuance of this Determination of Nonsignificance does not constitute project approval. Even though the County, in the DNS, sets forth what must be completed before the project is approved, the County failed to adhere to its own requirements as no evidence exists that any of the above requirements were met.

Although the trial court held that a final decision was made, such finding is not supported by the evidence because none of the requirements set forth in the Pierce County Code were followed with respect to constructing the pier. PCC 20.76.060, sets forth compliance regulations and references Chapter 18.140. Noncompliance with the Code causes a project to be null and void. Pierce County Code § 18.140.030(C). Clearly, the Borgert pier is unlawful as the code requirements were never followed, and the County adamantly refuses to require the Borgert pier be brought into compliance even though the County is mandated to enforce these development regulations.

The problems with the Abercrombie fence are even more profound because the Abercrombies never applied for a permit for the fence, even though, pursuant to PCC Title 18 and Title 20, they were required to do so before beginning construction.

As set forth in the introduction, and pursuant to Section 25 of the Shoreline Master Program, the Pierce County Prosecutor is responsible for enforcing the code provisions. Pursuant to the Shoreline Management Plan, the planning department is mandated with the duties of administering the rules and regulations related to permits. See CP 411. Even though the Pierce County prosecutor is required to enforce the PCC shoreline provisions, it has failed to do so with respect to the Abercrombie fence and Borgert pier.

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D. The Doctrine Of Finality Does Not Apply As No Final Decision Has Been Made.

Although the court held that the doctrine of finality precludes review, no final decision has been made for the Abercrombie fence or the Borgert pier. RCW 36.70C.020 defines a "land use decision" as follows:

> [F]inal determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:
>
> (a) An application for a project permit . . .

RCW 36.70C.020(2). As set forth above, no final decision has occurred for the Borgert pier as all requirements have not been satisfied. Additionally, no final decision has ever been made on the Abercrombie fence. The County relies upon an email sent to the Vans from a code enforcement supervisor, Yvonne Reed, to suggest a final decision was made. Respectfully, Ms. Reed is simply a code enforcement supervisor responsible to investigate complaints. No evidence exists that she is the officer with the highest level of authority to make a final determination, and she is not the lead responsible official as is required by PCC 18D.10.060. CP 71. Further, no authority exists to suggest that a final decision could be issued by way of an email communication. See PCC. As such, no final decision has been issued related to the Abercrombie fence.

Additionally, Exhibit "E" to the Mike Erkkinen declaration, the DNS issued by Adonais Clark, states as follows: "appeals must be filed within 14 days of the date of publication of the notice of determination of nonsignificance." CP 61. No proper publication or notice to adjoining property owners and other jurisdictions ever occurred so the appeal period never started pursuant to PCC 18.80.020. Respectfully, nothing occurred after the DNS was issued on June 20, 2001. As such, there has been no final decision on either the Abercrombie fence or the Borgert pier that would trigger the timeline in which to appeal.

With respect to the issuance of a DNS, WAC 197-11-340(2)(d) states as follows: "The date of issue for the DNS is the date the DNS is sent to the department of ecology and agencies with jurisdiction and is made publicly available."

No evidence exists that the DNS was ever sent to the Department of Ecology for review. Rather, the last date noted is June 20, 2001, when the County not only issued, but finalized the DNS. This is a legal impossibility. No evidence exists that the County followed WAC 197-11-340(2)(d).

Although it is clear that the Borgert pier was constructed, what is also clear is that it was not constructed lawfully nor was a "final decision" ever rendered that would necessitate the starting of the timeline in which to appeal. Pursuant to PCC 18.140.030(c) noncompliance with the code causes a project to be null and void.

Here, because of the noncompliance by the predecessors to Mr. Borgert, the project is null and void. A permit issued without consideration of environmental factors and therefore being in violation of SEPA is null and void. Ball v. City of Port Angeles and Port of Port Angeles, SHB No. 107[1]. Compliance with SEPA is required prior to permit issuance. Brachbogel, et al. v. Mason County & Tawanah Falls Beach Club, Inc., SHB No. 45.

After the DNS was issued, no further action was taken and the County presented no evidence to establish a final decision was ever rendered. Significantly, a County determination of nonsignificance (DNS) under SEPA must be sent to affected Indian Tribes. An approval of a shoreline substantial development permit where this is not done must be reversed. See Southpoint Coalition v. Jefferson County, SHB No. 86-47. Exhibit "A". Here, clearly the pier is

[1] All SHB cases referenced herein are provided in the appendix hereto.

issued in violation of the PCC, pertinent WACs, and it is illegal. Further, no final decision has ever been rendered, and, as such, petitioners have not missed the appeal timeline.

Additionally, the cases on which the County relies upon are clearly distinguishable as permitting occurred and final decisions were issued. See Durland v. San Juan County, 182 Wn.2d 55, 340 P.2d 192 (2014); Chelan County v. Nykreim, 146 Wn.2d 904, 52 P.3d 1 (2002) and Wenatchee Sportsman Assoc. v. Chelan County, 141 Wn.2d 169, 4 P.3d 123 (2000).

In Durland, San Juan County issued a building permit and the appellant skipped the administrative appeal process and filed a land use petition directly in the Superior Court to challenge the issuance of the building permit. The court dismissed the petition finding there was no land use decision under LUPA. The Court of Appeals and the Supreme Court affirmed. The court held that the petitioners were required to exhaust available administrative remedies in order to obtain a land use decision, which then could be appealed. The issue was not whether the building permit was appropriate, but whether notice had been given of the permit application and the granting of the permit. Because a lawful permit had been issued, a final decision occurred, and the LUPA timelines applied.

In Chelan County, an administrative decision had been made regarding a boundary line dispute and the question was whether LUPA applies to quasi-judicial land use decisions and not to administerial decisions such as boundary line adjustments. The Supreme Court determined that LUPA pertains to judicial review of all land use decisions and, therefore, was the appropriate appellate vehicle to use. Because the petitioners did not timely file a petition for review within 21 days under the LUPA provisions even though they had knowledge of its own decision fourteen months before filing of the declaratory judgment action, a final decision had been issued, from which the appellant failed to appeal. See also Wenatchee Sportsman Assoc. v.

Chelan County, 141 Wn.2d 169, 4 P.3d 123 (2000)(failure to timely file LUPA challenge bars from collaterally challenging validity at a later time).

Here, although the County asserts that a final decision was made, there is absolutely no evidence that any final decision has ever been made with respect to either the Borgert pier or Abercrombie fence. Not until a final decision is made can the doctrine of finality apply. Further, the property at issue, Lake Tapps, involves shorelines of state-wide significance which are open to all of the public. Because no final decision has been made, the doctrine of finality does not bar petitioner's petition for writ of mandamus.

E. Pierce County Has A Duty To Enforce The Pierce County Codes Related To Shoreline Development.

1. THE TRIAL COURT ERRED WHEN IT DISMISSED THE PETITION FOR WRIT OF MANDAMUS.

The trial court determined that although it had jurisdiction to consider the merits of appellant's petition for writ, it held that a writ was not appropriate because appellant failed to exhaust her administrative remedies, and that the doctrine of finality precluded the trial court's review of the County's decision. Respectfully, as set forth above, the County failed to issue any final decision regarding either the Abercrombie fence or the Borgert pier as Pierce County failed to enforce all Code provisions that needed to be followed before an appealable decision was returned never occurred.

Respectfully, when the County does not act appropriately with respect to the Pierce County Codes and the Shoreline Management Act when considering a proposed construction of a structure, then, respectfully, a writ would be appropriate to require the County to act as it is required to. As such, although the trial court was correct regarding its determination that it had

jurisdiction to consider the merits of the writ, its subsequent analysis was incorrect based upon the facts of this case.

A writ of mandamus issues to compel a government officer to perform mandatory duties of that office correctly. RCW 7.16.160. A writ should issue when the applicant satisfies the following three elements: "(1) the party subject to the writ is under a clear duty to act, RCW 7.16.160; (2) the applicant has no 'plain, speedy and adequate remedy in the ordinary course of law,' RCW 7.16.170; and (3) the applicant is 'beneficially interested.' RCW 7.16.170." Eugster v. City of Spokane, 118 Wn.App. 383, 402, 76 P.3d 741 (2003).

Here, because Ms. Verjee-Van satisfies all three elements, the trial court erred when it granted the County's motion and dismissed the petition.

2. PIERCE COUNTY IS UNDER A "CLEAR DUTY TO ACT" AS IT IS REQUIRED TO FOLLOW AND UPHOLD THE REQUIREMENTS OF THE PIERCE COUNTY CODE AND SHORELINE MANAGEMENT ACT.

On January 29, 2014, Ms. Verjee-Vans' prior attorney, Terry Brink sent a letter, with attachments, to Jill Guernsey, Pierce County Prosecuting Attorney, outlining permit violations related to the Abercrombie fence and the Borgert pier. CP 313-80. In response, Ms. Guernsey sent a return email stating that PALS would not reopen the issues discussed. CP 381. In essence, Pierce County refuses to apply the Pierce County Code and Shoreline Management Act uniformly to all persons and properties on Lake Tapps, and further, refuses to even consider error on its part.

The County has a duty to act. The County argues it is not required to follow the laws that were passed in order to maintain uniform application of the Pierce County Code to projects within the County. Respectfully, however, the County is required to enforce the shoreline codes pursuant to Section 25 of the Shoreline Master Program. CP 411. PCC 18.140.030(A) states

that "it shall be unlawful to conduct these regulated activities without first obtaining a written permit or approval." The County's piecemeal application of the PCC is arbitrary and capricious, and not something contemplated by the Pierce County Code when setting forth the enforcement provisions on development.

Pierce County, through the Pierce County Planning and Land Services Department, as a government agency, has a clear duty to follow the law. When it fails to act or acts arbitrarily and capriciously, the first element to issue a writ is satisfied.

3. MS. VERJEE-VAN HAS NO ALTERNATIVE OTHER THAN PURSUIT OF THIS WRIT.

The second element for a successful petition for a writ of mandamus requires the petitioner to prove that she has no 'plain, speedy and adequate remedy in the ordinary course of law.' Ms. Verjee-Van is without other remedies in this case.

Ms. Verjee-Van's neighbors constructed a pier and a fence that violate the Pierce County Code and Shoreline Management Act, yet no "final" decision occurred because no final decision was ever made regarding either project. In fact, neither project has been appropriately completed from a permit standpoint. Although Ms. Verjee-Van complained about the violations, Pierce County asserts without any compelling support, said structures are in compliance, and further, refuses to consider any issues surrounding non-compliance. Because Pierce County asserts said structures are in compliance, and the Abercrombies and Borgert have been informed by Pierce County that these structures comply with all County requirements, Ms. Verjee-Van has no other remedy than to petition for a writ. An appeal is not the appropriate course because an appeal only becomes ripe after a final decision is made. The County is governed with the responsibility of applying the Pierce County Code and Shoreline Management Act uniformly to all property owners, and not in an arbitrary and capricious manner. When the County fails to do so, and no

decisions exist from which to appeal, the only remedy for Ms. Verjee-Van is to seek the trial court's order mandating that the County uniformly apply the Code to the structures erected by her neighboring property owners. As such, the second element has been met.

4. MS. VERJEE-VAN IS 'BENEFICIALLY INTERESTED.'

Clearly Ms. Verjee-Van is beneficially interested as her property is impacted by the unlawful fence and dock that impacts her quiet enjoyment of her property. The third element is satisfied.

Respectfully, Ms. Verjee-Van satisfies all elements for the Court to issue the writ of mandamus.

VI. CONCLUSION

Ms. Verjee-Van respectfully requests that this Court reverse the trial court and order that a writ of mandamus be issued requiring Pierce County to properly administer the regulations dealing with Shoreline development on Lake Tapps such that appellant can enjoy her property. Alternatively, appellant requests that this Court reverse the trial court and order that a trial be held because material issues of fact exist surrounding the propriety of a writ of mandamus.

VII. APPENDIX

A-1 Ball v. City of Port Angeles and Port of Port Angeles, SHB No. 107

A-5 Brachbogel, et al. v. Mason County & Tawanah Falls Beach Club, Inc., SHB No. 45

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A-22 Southpoint Coalition v. Jefferson County, SHB No. 86-47

DATED THIS 10th day of October, 2016.

HESTER LAW GROUP, INC., P.S.
Attorneys for Appellant

By: _____
Brett A. Purtzer
WSB# 27813

CERTIFICATE OF SERVICE

I certify that on the day below set forth, I caused a true and correct copy of this brief to be served on the following in the manner indicated below:

Counsel for Respondent

Cort T. O'Connor
Deputy Prosecuting Attorney
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☐U.S. Mail
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Appellant

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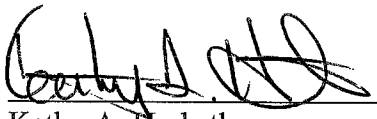
Signed at Tacoma, Washington this 10th day of October, 2016.



Kathy A. Herbstler

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SUBSTANTIAL DEVELOPMENT PERMIT ISSUED BY THE CITY OF PORT ANGELES TO THE PORT OF PORT ANGELES	
ALICE P. BALL, Appellant, vs. CITY OF PORT ANGELES and THE PORT OF PORT ANGELES, Respondents.	SHB No. 107 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the request for review of a substantial development permit issued by the City of Port Angeles to the Port of Port Angeles, came before the Shorelines Hearings Board (Walt Woodward, presiding officer) in the Commissioners' Meeting Room, Clallam County Courthouse, Port Angeles, Washington, at 10:00 a.m., March 1, 1974.

Appellant appeared pro se; Port of Port Angeles through Tyler Moffett, and the City of Port Angeles made no appearance. Richard

Reinertsen, Olympia court reporter, recorded the proceedings.

Witnesses were sworn and testified. Exhibits were admitted. Appellant and counsel made closing arguments.

From testimony heard, exhibits examined, arguments considered, transcript reviewed and exceptions denied, the Shorelines Hearings Board makes these

FINDINGS OF FACT

I.

On July 30, 1973, the Port of Port Angeles applied for a substantial development permit under chapter 90.58 RCW, from the City of Port Angeles for dredging, bulkheading and filling for ship moorage at the Port's Terminal No. 1, in Port Angeles Bay, Washington. After due public notice and at a public hearing, the City Council of the City of Port Angeles approved the permit on September 18, 1973. On October 15, 1973, appellant filed a request for review of the permit with the Board and on November 9, 1973, both the Attorney General and the Department of Ecology certified the request for review as reasonable.

II.

By stipulation of appellant and the Port of Port Angeles, the shorelines of Port Angeles Harbor are of state-wide significance.

III.

Appellant failed to prove that the permit is inconsistent with chapter 90.58 RCW or WAC 173-16. As of Septerber 18, 1973, there was not in existence any discernible or ascertainable master program of the City of Port Angeles.

IV.

The City Council of the City of Port Angeles, in granting the

permit failed to consider environmental factors of the proposed project as required by chapter 43.21C RCW, did not submit a finding of no significant environmental impact and did not prepare or consider an environmental impact statement.

V.

An Conclusion of Law hereinafter recited which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings, the Shorelines Hearings Board comes to these

CONCLUSIONS OF LAW

I.

The Shorelines Hearings Board has jurisdiction under chapter 90.58 RCW to review the permit and asserts jurisdiction to consider environmental aspects as specified in chapter 43.21C RCW.

II.

Uncontroverted testimony convinces this Board that the City Council of the City of Port Angeles granted the permit with total disregard for environmental factors and that this disregard is a violation of chapter 43.21C RCW, thus making the permit null and void.

III.

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

Therefore, the Shorelines Hearings Board issues this

ORDER

The substantial development permit issued by the City of Port Angeles on September 18, 1973 to the Port of Port Angeles is hereby vacated without prejudice.

DONE at Lacey, Washington this 28th day of May, 1974.

SHORELINES HEARINGS BOARD

Walt Woodward
WALT WOODWARD, Chairman

W. A. Gissberg
W. A. GISSBERG, Member

Mary Ellen McCaffree
MARY ELLEN McCAFFREE, Member

Robert F. Hintz
ROBERT F. HINTZ, Member

Hard Copy - PS.
pier/dock

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SUBSTANTIAL DEVELOPMENT PERMIT ISSUED BY MASON COUNTY TO TWANOH FALLS BEACH CLUB, INC.	
M. W. BRACHVOGEL, et al. and RANDY E. AND CAROL R. McILRAITH, et al., Appellants, vs. MASON COUNTY and TWANOH FALLS BEACH CLUB, INC., Respondents, STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY and SLADE GORTON, ATTORNEY GENERAL, Amici Curiae,	SHB Nos. 45 and 45-A FINDINGS OF FACT, CONCLUSIONS AND ORDER

This matter, a request for a reversal of a substantial development permit granted by Mason County to Twanoh Falls Beach Club, Inc., came before members of the Shorelines Hearings Board at a formal hearing in

Olympia, Washington conducted at 10:00 a.m. on March 12, 1973. Board members present were: Walt Woodward, Chairman, W. A. Gissberg, presiding officer, James T. Sheehy and Robert F. Hintz.

The appellants, M. W. Brachvogel, et al., were represented by John Petrich, and Phillip M. Best represented Randy E. and Carol R. McIlraith, et al. Twanoh Falls Beach Club, Inc. was represented by Mary Ellen Hanley. Mason County was not represented. Robert V. Jensen appeared as amicus curiae. The proceedings were recorded by Richard Reinertsen, an Olympia court reporter.

The Board entered its Proposed Findings, Conclusions and Order on June 11, 1973, which Proposed Order conditionally approved the substantial development permit issued by Mason County to respondent, Twanoh Falls Beach Club, Inc. Exceptions were duly filed with the Board by appellant, M. W. Brachvogel, et al. The Board asked for further oral argument or written statements of the parties on appellants' numbered Exception VII relating to the Board's proposed Conclusion II. That proposed Conclusion was that the granting of the permit was not a major action requiring an environmental impact statement under the State Environmental Policy Act (SEPA). Briefs were submitted by the parties on that question and supplemented by oral argument before certain Board members on July 25, 1973.

Having carefully considered all of the Exceptions and the contentions of the parties, the Board concludes that appellant Brachvogel's Exception VII is well taken and should be and therefore is granted. We believe the recent case of Juanita Bay Valley Community Association vs. City of Kirkland, 9 Wn. App. 59 (June 4, 1973) to be controlling and

that it prevents this Board, as a matter of law, from making the initia determination that the issuance of the permit was not a major action under SEPA. We are unable to ascertain, from an examination of the record, whether that determination was made by Mason County. The mere fact that no environmental impact statement was prepared is not in itself proof that the County made a determination that none was required, nor can we indulge in such a presumption. Further, the record does not affirmatively show (and we believe that it must) that the County considered the environmental factors in the project before determining whether or not an environmental impact statement must be prepared. The record reveals that some factors affecting the environment were before the County, in written form and we are asked by respondents to presume that the County Commissioners did not neglect their duty of considering them. We express no opinion whether the factors before them were comprehensive and sufficient. See Hanly vs. Mitchell, 460 F.2d 640 (2d Cir. 1972). We are unable to ascertain what they did consider or whether they gave any consideration.

Here too we canrot presure that the County considered environmental factors. We cannot do so because of the strong, directive language of SEPA found in RCW 43.21C.030.

In remanding this matter to Mason County, we adhere to those Proposed Findings and Order which relate to and are relevant to the Shoreline Management Act. However, we, as stated in Hanly vs. Mitchell, supra, do not "regard the remand as pure ritual."

We direct that the determination to be made under SEPA be made in good faith after full consideration. We suggest that the County

Commissioners address themselves to a consideration of the environmental factors mentioned in the dissent of Mr. Sheehy to the Proposed Findings, Conclusions and Order heretofore provided to the parties to this request for review.

If the County determines that no environmental impact statement is required because the quality of the environment will not be significantly affected, this Board can review that question again.

Accordingly, from the evidence presented (testimony and exhibits) and assisted by arguments by counsel and from a review of the transcript of the hearing, the Shorelines Hearings Board makes the following:

FINDINGS OF FACT

I.

On November 13, 1972, the Mason County Board of County Commissioners, after public hearings conducted on four separate dates, granted Shorelines Management Substantial Development Permit No. 24 to Twanoh Falls Beach Club, Inc. for a development on the shoreline of Hood Canal located on a site seven and eight-tenths miles southwest of Belfair, Washington. In authorizing the permit, the Board was acting as the "local governmental agency" under the Shoreline Management Act of 1971 and followed procedures established pursuant to the requirements of that Act. Development authorized by the permit was to "repair and replace piling, float, etc. destroyed by ice and construct a new float, provided property line of Twanoh Falls development be adequately posted, the current county boating ordinance posted conspicuously on dock, along with 'no skiing from west side of pier' signs to be posted". In addition, the following standard conditions were imposed:

1. This permit is granted pursuant to the Shoreline Management Ac of 1971 and nothing in this permit shall excuse the applicant from compliance with any other Federal, State or local statutes, ordinances or regulations applicable to this project.

2. This permit may be rescinded pursuant to Section 14(7) of the Shoreline Management Act of 1971, in the event the permittee fails to comply with any condition hereof.

3. Construction pursuant to this permit will not begin or is not authorized until forty-five (45) days from the date of filing of the final order of the local government with the Department of Ecology or Attorney General, whichever comes first; or until all review proceedings initiated within forty-five (45) days from the date of filing of the final order of the local government with the Department of Ecology or Attorney General, whichever comes first; or until all review proceedings initiated within forty-five (45) days from the day of such filing have been terminated.

II.

The site consists of 372 lineal feet of waterfront on Hood Canal containing approximately 56,000 square feet between the bulkheaded shoreline and the State highway. The site is jointly owned by members of the Twanoh Falls Beach Club, Inc. who are eligible for membership by reason of ownership of one or more lots in a 397 lot subdivision on the hillside lying south of the State highway abutting the beachfront property. About 150 of these lots are improved and capable of occupancy. Improvements now existing on the beachfront property consist of a

bulkhead, cabana dressing rooms, playground equipment and a line of piles extending approximately 434 feet northward into Hood Canal near the southwestern edge of the property. The piles have been used to anchor a floating walkway and a 120 foot floating dock with a capacity to moor 18 to 20 small craft.

III.

The hearings before the Mason County Board of County Commissioners revealed opposition to the proposed development by owners of adjacent property and by others. Opposition was based upon hazards to swimmers caused by overconcentration of small boat movements, water skiing activity and contamination of the water, and by the creation of excessive noise and by motor oils.

IV.

The record is silent as to whether the County Commissioners considered environmental factors in the project and whether they determined that it is or is not a major action significantly affecting the quality of the environment. The County did not require the preparation of an environmental impact statement.

V.

The Hood Canal Advisory Commission is a citizens group which consists of three members from each of three counties: Mason, Kitsap and Jefferson. Members from each of the counties are appointed by the respective County Boards. The Advisory Commission meets monthly concerning environmental matters and problems in areas bordering Hood Canal. From time to time its advice is sought by the County Boards of its three constituent counties. In response to a request by Mason County

Board of County Commissioners, the Hood Canal Advisory Commission reviewed Application No. 24 by Twanoh Falls Beach Club, Inc., viewed the site and subsequently recommended that the application for a substantial development permit as proposed by the applicant be denied.

VI.

The existing development, including the floating walkway extending 442 feet into Hood Canal and the 120 foot mooring float at right angles thereto were installed in 1965 without a U. S. Army Corps of Engineers' permit or a State Hydraulic Permit. Facilities have been in continuous use since that date and no notice of violation has been made by the U. S. Army Corps of Engineers or the State of Washington.

VII.

Hood Canal shorelines are shorelines of state-wide significance having high aesthetic, recreational and ecological values. The shoreline in the vicinity of this application is intensively developed with residential structures occupied year round or seasonally by summer residents.

VIII.

Mason County has completed its shoreline inventory as required by the Shoreline Management Act of 1971; development of its master program is in process. Evaluation of Application No. 24 by the County Board was based upon the policies set forth in Section 2 of the Act and the guidelines issued by the Department of Ecology on June 20, 1972.

IX.

The Twanoh Falls Beach Club, Inc. has made the application to the Department of the Army, Seattle Corps of Engineers for the work

contemplated in its Application No. 24 to Mason County for a substantial development permit.

X.

The plan for the project as set forth in the Corps of Engineers application was utilized in the Application for Substantial Development No. 24. That plan calls for repair and preservation of existing bulkhead and pier and the driving of additional piles in Hood Canal. Under the plan, the existing 24 piles would be supplemented by 39 additional piles and the conversion of the floating walkway to a rigid pier or walkway extending 434 feet into Hood Canal. The surface of the walkway would be 15.8 feet above mean lower low water. The walkway would be protected on both sides by three foot high handrails. The plan includes the existing float 120 feet long reached by a thirty foot ramp, extending eastward from the walkway at a point 370 feet out from the existing rock bulkhead. A new finger float 120 feet long reached by a thirty foot ramp would extend eastward from the end of the walkway at a point approximately 430 feet out from the existing bulkhead.

From these Findings of Fact, the Shorelines Hearings Board comes to these

CONCLUSIONS

I.

Appellants contend that in granting a conditional substantial development permit to Twanoh Falls Beach Club, Inc., the Mason County Board of Commissioners should have complied with the Administrative Procedures Act because in granting said permit it was acting as an agency of the State. Such contention is without merit; County

Commissioners need not comply with the Administrative Procedures Act.

II.

Mason County did not comply with SEPA and is required to do so prior to the issuance of any substantial development permit.

III.

The conditional permit granted by the Mason County Board of Commissioners and the application by the Twanoh Falls Beach Club, Inc. for a U. S. Army Corps of Engineers' permit was for a total development incorporating previous improvements installed with or without a permit. Hood Canal and its bordering lands constitute shorelines of state-wide significance. The area involved here possesses high scenic and recreational values, generally recognized and appreciated as a finite and precious resource by residents and visitors alike.

This is a dispute between homeowners of individual properties utilized for dwelling and recreational purposes on the one hand and joint or corporate owners of adjacent property utilized exclusively for recreational purposes. The focus of water-oriented activities by the owners and guests of 150 improved nearby properties on 372 lineal feet of commonly owned waterfront has produced a sharp contrast with the density of persons and their recreational pursuits on the adjoining and nearby properties which generally support lower concentrations of persons and activities on a front foot basis. It must be recognized that superb recreational environments will have peak periods of attraction and use. In these circumstances the rate of use can be self-regulating: over-crowding discourages more activity unless the capacity of the facility is expanded.

IV.

The potential demand for use of the Twanoh Falls Beach Club, Inc. facilities could be more than double the current rate of use since less than half of the lots of the potentially participating members are developed for occupancy. Some reasonable control of use and activities should be established.

V.

The limited shoreline resource can provide a direct recreation opportunity to people in each of three ways, each of which must be considered as a legitimate opportunity to enjoy this finite resource: (1) through private ownership; (2) through joint or community ownership, and (3) through public ownership. Public ownership of waterfront recreational facilities offers the highest benefit cost ratio, yet the amount of public ownership must necessarily remain quite limited. Joint or community ownership of waterfront presents the next highest benefit cost ratio, providing an effective means for multiple use and enjoyment of the shoreline resources.

VI.

The development as modified by this order is consistent with the policy of the Shoreline Management Act and the guidelines of the Department of Ecology. Therefore, the Shorelines Hearings Board makes thi:

ORDER

1. The permit is remanded to the Mason County Commissioners to consider the environmental factors in the project and to make a determination, based on such consideration, as to: (a) whether the project is or is not a major action significantly affecting the quality

of the environment; (b) whether or not to require the preparation of an environmental impact statement, and (c) to reconsider the issuance of the substantial development permit in light of such determinations.

2. Upon reconsideration of the issuance of the permit, as above provided, and if the same shall be granted, this Board requires the following additional conditions thereto:

(a) That the rigid piers supporting the walkway extend no farther than 430 feet from the existing rock bulkhead;

(b) That only one 120 foot finger float be installed extending eastward from the end of the pier, and

(c) That use of the pier and beach facilities be limited to the owners and guests of the existing 397 platted lots.

DONE at Lacey, Washington this 10th day of August, 1973.

SHORELINES HEARINGS BOARD

Walt Woodward

WALT WOODWARD, Chairman

RALPH A. [illegible]WICK, Member

W. A. GISSBERG, Member

Robert F. Hintz

ROBERT F. HINTZ, Member

Tracy J. Owen

TRACY J. OWEN, Member

JAMES T. SHEEHY, Member

DISSENT

I dissent from the Conclusions of Law and Order which the majority of this Board have entered. Both the applicant, Twanoh Falls Beach Club, Inc., and the Board of commissioners of Mason County have failed to comply with the purpose and spirit of the Shoreline Management Act of 1971 (SMA) and the State Environmental Policy Act of 1971 (SEPA). A substantial development permit as granted by the Mason County Commissioners should either be reversed and denied altogether, or remanded to the Board of Mason County Commissioners for substantial compliance with both Acts.

I agree with the majority that the permit must be remanded for compliance by the Commissioners with SEPA, but I dissent from the majority's Conclusion No. VI that the development as modified by its order is consistent with the policy of the SMA and the guidelines of the Department of Ecology.

Before approving this or any other pier application for Hood Canal we should know how the plan would fit in with a master program for the Canal. Another way of stating this is that a type of zoning should be promulgated by the Mason County Commissioners which would deal with location, spacing, length, buffer zones and density of use. No master program for the portion of Hood Canal lying within Mason County has been developed. The SMA provides that in preparing such a master program, local government shall give preference to uses in the following order of preference as stated in RCW 90.58.020:

"1. Recognize and protect the statewide interests over local interests;

"2. Preserve the natural character of the shoreline;

"3. Result in long-term over short-term benefit;

"4. Protect the resources and ecology of the shoreline;

"5. Increase public access to publicly owned areas of the shorelines;

"6. Increase recreational opportunities for the public in the shoreline;

"7. Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary."

The majority appears to approve of this type of development in its Conclusion No. V because it provides access to the beach with a higher "benefit cost ratio" than individual private ownership of the shoreline. It is questionable whether this particular use comes within any of the preferred uses under the SMA and this argument standing alone provides no justification for approval under the SMA.

RCW 90.58.140 provides that until such time as an applicable master program has become effective, a permit shall be granted only when the development proposed is consistent with the guidelines and regulations of the Department of Ecology. The proposed development is inconsistent with those guidelines. For instance, the guidelines relating to piers (WAC 173-16-060(19)), provides in part as follows: (1) That the use of floating docks should be encouraged in those areas where scenic values are high; (2) That those agencies faced with the granting of pier applications should establish criteria for their location, spacing and length with regard to the geographical characteristics of the particular area; (3) That the capacity of the shorelines sites to absorb the impact of waste discharges from boats, including gas and oil spillage,

should be considered.

The evidence before this Board does not convince me that the existing floating dock needs to be converted to a permanent pier and it appears that the Mason County Commissioners have developed no set of standards of criteria for the location, spacing and length of piers on Hood Canal. Neither does there seem to be any evidence that the impact of waste discharges has been investigated in any meaningful way, either by the applicant or the County Commissioners.

As measured by the guidelines of the Department of Ecology promulgated in December, 1972, for use with SEPA determinations, the project will also significantly affect the quality of the environment. The Board has taken the position that the permit application is for a total development incorporating previous improvements installed with or without a permit. The evidence before the Board indicated that the floating dock that now exists has had a great impact on the mouth of the creek on which it was built. Where once there was an abundant oyster bed, now there is none; where once the fish population in the creek was plentiful, now it is very small, if in fact it does exist; where once a significant smelt fishery was found on this shore, now there is none; where once the view of the tidelands and the waters of Hood Canal were unobstructed, now it is framed by unsightly piling. The additional construction would only increase these detrimental effects. These effects are irreversible for at least as long as the pier exists in its present location.

It appears that the only systematic evaluation for this pier application was made by the Hood Canal Advisory Commission and this

official citizens' group concluded and recommended to the Mason County Commissioners that the application for permit be denied on the basis that a float pier was preferable in an area of such scenic beauty as Hood Canal; that the pier was located at one edge of the property rather than the center, causing a significant interference in the use of the adjoining property; and finally, that the pier was too long in relation to the size of the beach it served.

There has been little or no systematic evaluation by the Board of Commissioners of Mason County nor this Board as to how this particular pier will actually benefit the people it is intended to benefit or how it will relate to a total picture of development of this type for Hood Canal. There is a question whether this project is needed at all for adequate recreational use of the area by the members of the Beach Club. The boat moorage facilities themselves will not change. Most of the individual beachowners adjacent to or near the project in this matter use the buoy method of mooring their boats which has no appreciable effect on the environment. Since a public launch facility is available nearby at Twanoh State Park, I see no reason why this method could not be used by members of the Beach Club. At the very least, I see no reason why the Club cannot continue with the existing floating dock. Although there was a claim made that the existing dock has a somewhat higher maintenance cost than a permanent pier, the testimony was vague on this particular issue and it did not appear that the cost was excessive when considered on a per-lot basis.

There has been an inadequate evaluation of the effects on the shoreline by reason of the upland use and the large numbers of people

which would be using the relatively small stretch of beach. In the recent decision of the Count of Appeals in the case of Merkel v. Port of Brownsville, 8 Wn. App. 844 (Div. II 1973), the Court held that a single improvement or project having an interrelated effect on both uplands and shorelines cannot be divided into segments for purposes of complying with the provisions of SEPA and SMA. This case applies to the Twanoh Falls Beach Club, Inc. improvement as the application for a pier is an integral part of the total recreational home development. In considering the numbers of people which would be entitled to use the relatively small area of beach, there could well be a density of use on this particular segment of shoreline which would greatly exceed the density of use on many, if not all, of our State parks. In fact, when all lots in the platted upland are sold and occupied and all owners and their families have joined in membership in the Beach Club, the density of use in the shoreline involved in this matter could eventually reach a figure which would constitute an inescapable, intolerable and unjust nuisance to the property owners adjacent to and in close proximity to the Twanoh Falls Beach Club.

Until we are provided with some kind of data or criteria, such as has not been provided in this case, this Board will be unable to make an intelligent and informed decision concerning pier applications. Private beach clubs should not be automatically allowed to construct environmentally damaging structures merely because they claim to give more people access to a limited area of beach. The project should be evaluated to determine whether or not it is really needed and how many people would really benefit by the construction. This should be

compared with how many people would be directly and detrimentally affected. It appears that the plan as approved will provide for moorage for only fifteen (15) boats, but more than fifteen (15) adjoining owners would be detrimentally affected by this project. There is no buffer zone between this pier and adjoining property such as we require for State parks and industries. No less should be required in this type of project.

For all of the foregoing reasons it is my belief that the permit should be either denied or remanded to the Board of Commissioners of Mason County for proceedings in conformity with both SEPA and SMA.

JAMES T. SHEEHY, Member
SHORELINES HEARINGS BOARD

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SUBSTANTIAL DEVELOPMENT PERMIT GRANTED BY JEFFERSON COUNTY TO OLYMPIC SEA FARMS, INC.,	
SOUTH POINT COALITION, Appellant,	SHB NO. 86-47
State of Washington DEPARTMENT OF ECOLOGY and DEPARTMENT OF FISHERIES, Appellant-Intervenors	
v.	ORDER GRANTING SUMMARY JUDGMENT
JEFFERSON COUNTY and OLYMPIC FARMS, INC., Respondents,	
and	
State of Washington DEPARTMENT OF NATURAL RESOURCES, Respondent-Intervenor	

This matter, having come before the Board by Motion for Summary Judgment filed by Appellant South Point Coalition ("South Point"), and the Board having considered the following:

1. South Point's Motion for Summary Judgment filed March 16, 1987, together with Memorandum in Support and Exhibits A, B, C, D, E, F (affidavit of S. Ralph), and affidavit of R. Meinig and its Exhibits 1, 2, 3, 4; and

2. Respondents Jefferson County, Olympic Sea Farms, Inc., and Washington State Department of Natural Resources' Memorandum in Opposition filed March 31, 1987, and Exhibits A (affidavit of K. Perjanoic) and B (minutes of Jefferson County Board of Commissioners' meeting September 8, 1986);

And being fully advised, the Board finds it to be uncontested that the affected Tribes, the Clallam and Skokomish Tribes represented by the Point No Point Treaty Council, were not sent the County's Determination of Non-significance ("DNS") and the environmental checklist. Pursuant to WAC 371-08-031(2) of the Board's procedural rules, and Civil Rule 56 of Superior Court, judgment as a matter of law should be granted, based on that finding alone. See Moe v. DOE, SHB No. 78-15 (1978). The undisputed facts are:

I

FINDINGS OF FACT

1. On June 16, 1987, Olympic Sea Farms, Inc. ("Olympic") filed with Jefferson County an application for a shoreline substantial

development permit. Olympic sought a permit to place 22 salmon net pens at South Point in the Hood Canal, approximately five miles south of the Hood Canal Bridge at the site of the former ferry terminal.

2. A Notice of Application was published in the Port Townsend Leader starting June 18, 1986 and for two weeks thereafter. Notices were sent to adjoining property owners and a notice was posted.

3. On July 21, 1986, the Jefferson County Board of Commissioners, after review of the environmental checklist and other materials, determined it was the lead agency for the project under SEPA, issued a DNS for the project, determining that an environmental impact statement was not required, and provided a comment period until August 6, 1987.

4. Neither the DNS nor the environmental checklist were sent to the affected tribes, the Clallam and Skokomish Tribes represented by the Point No Point Treaty Council.

5. The proposed project involves other agencies with jurisdiction to approve or deny its placement or operation, in addition to Jefferson County.

6. On September 22, 1987, after proceedings on September 8 and 15, 1987, the Jefferson County Board of County Commissioners issued a conditioned Shoreline substantial development permit to Olympic Sea Farms, Inc. A hearing had been held before the Jefferson-Port Townsend Shoreline Management Advisory Commission on August 6, 1986 on

the application, with additional Shoreline Commission proceedings that same month.

7. On October 27, 1986, appellant South Point Coalition filed a timely appeal with the Board.

8. A pre-hearing conference was held on December 16, 1986, before Judith A. Bendor, member and presiding, with all parties represented. As a result of the conference and written materials received and considered, pre-hearing orders were issued. A formal hearing was scheduled for May 18-27, 1987 and June 1-5, 1987.

9. On March 16, 1987, Appellant's Motion for Summary Judgment was filed. The Memorandum in Opposition was filed on March 31, 1987.

10. The Board reviewed the file herein, deliberated, and authorized that the presiding member deliver an oral opinion to the parties for their convenience. This was done by telephone conference on April 17, 1987; all parties were represented.

From the facts, the Board reaches the following legal conclusions:

II

CONCLUSIONS OF LAW

1. Jefferson County is the lead agency which issued the DNS, determined that an EIS should not be prepared, and provided a comment period on that decision. The County failed to notify affected Clallam and Skokomish Tribes of this decision, thereby violating the mandatory requirements of WAC 197-11-340(2)(b) which states:

> The responsible official shall send the DNS and environmental checklist to agencies with jurisdiction, the department of ecology, and affected tribes, and each local agency or political subdivision whose public services would be changed as a result of implementation of the proposal, and shall give notice under 197-11-510. (Emphasis added)

2. A key goal of the State Environmental Policy Act ("SEPA") is to ensure that governments plan, decide, and implement the substantive provisions of the Act after being informed of environmental concerns. RCW 43.21C.020(2), 43.21C.110(1)(e) and (1); See Settle The Washington State Environmental Policy Act (1987) section 5(d) p. 33.

3. SEPA is a statute which places a heightened emphasis on clear procedures geared to informed governmental decision-making. Providing notice of a proposed action is central to ensuring participation, such that governments have the opportunity to engage in an informed process. See Glaspey & Sons v. Conrad, 83 Wn.2d 707, 521 P.2d 1173 (1974).

4. An informed process is vitally important to the integrity of SEPA, and therefore important for all Washingtonians, not just for those who may not have received notice and might thus be individually prejudiced. See Norway Hill Preservation & Protection Association v. King County Council, 87 Wn.2d 267, 552 P.2d 674 (1976). This Board's Order, founded on SEPA, therefore does not and need not

address whether prejudice to a particular party may have occurred in this instance, despite respondents' contentions to this effect, e.g., Strand v. Snohomish, SHB No. 85-4 (1985).

5. In shorelines matters, the evidence considered by this Board may differ from that considered by the local permitting entity. New or additional information may be introduced. San Juan County v. Department of Natural Resources, 28 Wn.App. 796 626 P.2d 995 (1981). However, our review function cannot perform mandated procedural requirements assigned to local government. This has led us, in certain cases, to invalidate local decisions where notice requirements were not met, e.g., Save Flounder Bay, et al. v. City of Anacortes and Mausel, SHB 81-15 (1982); Schwinge v. Town of Friday Harbor, SHB 84-31 (1985).

6. The soundness of such an approach is even clearer when SEPA compliance issues are part of shorelines cases. A consistent theme when reviewing for SEPA compliance is an insistence on procedural regularity. The emphasis is on informed choice. For threshold decisions, this means that prima facie compliance with the procedural requirements of SEPA must occur before the deciding agency reaches its ultimate decision. Sisley v. San Juan County, 89 Wn.2d 78, 569 P.2d 712 (1977); Norway Hill, supra; Juanita Bay Valley

Community Association v. Kirkland, 9 Wn.App. 59, 510 P.2d 1140 (1973).

We conclude, therefore, that the information gathering function essential to an informed threshold decision cannot be performed at a later date by this Board. Strict compliance with the consultation requirements of WAC 197-11-340(2)(b) is necessary to the validity of a threshold decision. [1]

7. Respondents' claims that constructive notice has occurred and therefore compliance has resulted, is ultimately legally unpursuasive. The requirement to send the notice is clear and unambiguous, and has not been fulfilled. The unambiguous language of the regulation leaves no room for construction; its plain meaning is to be given effect. See, King County v. The Taxpayers of King County, 104 Wn.2d 1, 700 P.2d 1143 (1985); Bavarian Properties, Ltd. v. Ross, 104 Wn.2d 73, 700 P.2d 1161 (1985).

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1. Where, as here, there is more than one agency with jurisdiction the responsible official's initial DNS determination is merely tentative. WAC 197-11-340. Other entities must be notified, provided the DNS and environmental checklist, and their responses considered. WAC 197-11-340(2)(b). If, after this comment cycle, "significant adverse impacts are likely", the DNS must be withdrawn. WAC 197-11-340(2)(f). WAC 197-11-340(3)(a)(ii).

8. Respondents' contention that affected Tribes' concerns are the same as those of non-tribal gill netters is speculative, unsupported by the record before the Board, and ultimately legally irrelevant. The regulation requires that notice to the Tribes shall be given.

9. Respondents' contention that newspaper articles notifying the public about the permit applicaton somehow supplant WAC 197-11-340(2)(b) SEPA notice requirements for the Tribes is misplaced. The WAC mandatory language requires specific notice to the Tribes and to agencies, political subdivisions, as well as notice under 197-11-510 In addition, many of the newspaper articles cited by respondents occurred on dates after the County's July 21, 1986 threshold decision and DNS issuance, and even after the DNS comment closure date of August 6, 1986.

10. Even if the Tribes might have been afforded notice through the United States Army Corps of Engineers Section 10 Permit process, as respondents contend, such procedure in no way abrogates Washington residents' rights to an informed threshold decision by State or local government through State Environmental Policy Act procedures .

11. We hold the County's failure to comply with WAC 197-11-340(2)(b), by failing to notify the affected Tribes

about the DNS and to notify them about the opportunity to comment on it, as a matter of law deprives the County of an informed decision under SEPA. Therefore, the DNS shall be vacated and the substantial development permit reversed and remanded.

III

The Board further finds that there remain genuine issues of material fact regarding the following legal issues:

1. Was the content of the notices of the shoreline substantial development permit application, as required by WAC 173-14-070, so inaccurate or otherwise defective as to merit reversal? (Appellant's Issue II A.)

2. Did the shoreline permit application process fail to provide affected Tribes notice and the opportunity to comment, so as to contravene the Shoreline Management Act ("SMA") or the implementing regulations, so as to merit reversal under Chapter 197-11 WAC? (Appellant's Issue II B.)

3. Did the Jefferson County Board of Commissioners fail to consider the impact of the proposed net pens on existing commercial fishing operations, or on navigation, so as to contravene the SMA or SEPA, and thereby merit reversal? (Appellant's Issue II E.)

4. Has the proposed project changed so substantially since DNS issuance, so as to require under SEPA or WAC 197-11-340(3)(a) or (c) the vacating of the DNS, and a remand to the County for a new threshold determination? (Appellant's Issue II F.)

5. If errors were committed regarding notice of the shoreline permit application (Appellant's Issues II A. and B.), were the cummulative effects sufficient to merit reversal? (Appellant's Issue II D.)

The Board, therefore, declines to issue Summary Judgement on the above five issues.

ORDER

Appellant's Motion for Summary Judgment is GRANTED in part, and DENIED in part.

Jefferson County's approval of the Shoreline Substantial Development Permit is hereby reversed and remanded for proceedings consistent with this Order.

DONE this 26th day of May, 1987.

SHORELINES HEARINGS BOARD

Judith A. Bendor, Presiding
JUDITH A. BENDOR, Presiding

5/20/87
LAWRENCE J. FAULK, Chairman

Wick Dufford
WICK DUFFORD, Member

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